BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBY FRAGA Claimant	)	
VS.	)	Docket No. 1,024,767
LABOR READY CENTRAL, INC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the February 20, 2007, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on May 23, 2007. Richard Billings, of Topeka, Kansas, appeared for claimant. John C. Kennyhertz, of Overland Park, Kansas, appeared for respondent.

The Board has considered the record and adopted the stipulations listed in the Award.

The Administrative Law Judge (ALJ) found that claimant suffered an 18 percent permanent partial impairment to the body as a whole as a result of injuries suffered in a July 19, 2005, accident while working for respondent.[1] The ALJ gave weight to the impairment ratings of both Dr. Daniel Zimmerman (23 percent) and Dr. Terence Pratt (7 percent), giving less weight to Dr. Pratt's opinion because of some less definite findings as to strength and range of motion.

Using a wage statement from respondent attached as an exhibit to the deposition of the claimant, the ALJ noted that claimant worked a total of 363.5 total hours in the 26-week period before his July 19, 2005, date of accident, earning a total of $2,438.76. The ALJ found that claimant was a full-time employee by virtue of his averaging 20 hours per week for respondent and 20 hours per week for Labor Pros, doing similar work for both.

[1] Although the ALJ states this is a work disability, the 18 percent permanent partial disability award was actually based upon claimant's percentage of functional impairment.

The ALJ computed claimant's average wage as being $6.71 per hour or $268.40 per week, making a compensation rate of $178.94. The ALJ found that 18 weeks of temporary total disability benefits previously paid at the rate of $81 per week should be adjusted to show the compensation rate of $178.94.

ISSUES

Respondent requests review of the Award, arguing that the ALJ erred in determining the nature and extent of claimant's permanent partial impairment. Respondent contends that Dr. Pratt did take into account claimant's strength and range of motion in determining his permanent impairment. Respondent also contends that Dr. Zimmerman should have relied upon the diagnosis related estimate (DRE) model of the AMA *Guides*[2] rather than the range of motion model in determining the permanent partial impairment to claimant's lumbosacral spine. Accordingly, respondent argues that the ALJ should have given greater weight to the opinion of Dr. Pratt in determining claimant's permanent partial impairment. In the alternative, respondent requests that the Board give equal weight to the opinions of Drs. Pratt and Zimmerman in determining claimant's permanent partial impairment, which would compute to a 15 percent permanent partial impairment to the body as a whole.

Respondent further argues that the ALJ erred in determining claimant's average weekly wage and finding an underpayment of temporary total disability benefits. Respondent agrees with the ALJ that there was no evidence in the record substantiating claimant's claim that he earned $9.50 per hour with Labor Pros or, in fact, that claimant ever worked for Labor Pros, other than claimant's self-serving testimony. Respondent further argues that claimant is not a full-time employee, as found by the ALJ but is, in fact, a part-time employee of respondent. Finally, respondent argues that the wage statement it entered into evidence shows that claimant had an average weekly wage of $121.93 for the work claimant performed working for respondent during the 26 weeks next preceding the date of accident. This would equate to a weekly compensation rate of $81.29.

Claimant argues that the ALJ's award should be affirmed in its entirety. Claimant contends the ALJ did not err in giving greater weight to the opinion of Dr. Zimmerman. Claimant argues the ALJ did not give Dr. Pratt's opinion less weight because he did not take into account claimant's strength and range of motion but, instead, the ALJ found that Dr. Zimmerman's findings as to strength and range of motion were more definite. As to the fact that Dr. Zimmerman did not use the DRE method to rate claimant's lumbosacral spine impairment, claimant points out that Dr. Zimmerman testified that the AMA *Guides* do not make the use of the DRE model mandatory. Claimant also contends the ALJ correctly determined claimant's compensation rate to be $178.94 because the evidence was

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

uncontroverted that claimant also worked part time for Labor Pros and averaged approximately 20 hours per week during the 26 week period before his work-related injury.

The issues for the Board's review are:

(1) What is claimant's average weekly wage?

(2) What is the nature and extent of claimant's permanent partial disability?

FINDINGS OF FACT

The parties' stipulations taken by the ALJ at the September 5, 2006, Regular Hearing failed to include the parties' respective positions on nature and extent of disability, functional impairment, and average weekly wage. The ALJ likewise failed to require respondent to have the payroll records available at that hearing.

Respondent is a business that places temporary workers with employers on a day-to-day basis. Darrell Carey, the branch manager of respondent's office in Olathe, Kansas, testified concerning respondent's process for hiring and placing employees. Potential employees are screened and tested. If the potential employee qualifies, he or she is given an application and is placed in the computer. Thereafter, the employee checks in with respondent and, if there is a job available for which the employee is qualified, the employee is placed in that job that day. Employees check in with respondent only on days they want to work. There is no guarantee that a job will be available to an employee. On the other hand, if an employee does not want to work, he or she does not have to report to respondent. There are no repercussions to an employee for not appearing to report for work. Different employers pay different salaries, and employees are paid according to the project and their skills. The decision as to whether a particular employee is placed in a particular job is made on a day-to-day basis. Claimant was considered a temporary employee. Although he had a longstanding history of employment with respondent, he remained on a day-to-day basis in terms of where he would be placed and how much he would earn.

Claimant began working for respondent on September 13, 2001. He has worked out of respondent's offices in Kansas, California and Nevada. Although at times claimant worked 40 or more hours a week, he was a part-time employee of respondent from January 2005 through July 2005. Claimant said that he believed his average wage at respondent was $6.16 per hour. An unsigned and unverified wage statement is attached as Exhibit 2 to claimant's deposition taken September 29, 2006. It was offered into evidence by respondent and admitted without objection.[3] That wage statement shows that for the 26 week-period before claimant's July 19, 2005, injury, claimant worked 363.5 hours

[3] Fraga Depo. (Sept. 29, 2006) at 64.

and earned wages in the total amount of $2,438.79. This is an average of $6.71 per hour and an average of 14 hours per week, for an average weekly wage of $93.94. That wage statement also shows that claimant worked from as little as 2 hours a day to as many as 12 hours a day. During that time, his hourly rate of pay ranged from $6 to $7.50 per hour.

Claimant also worked for another employer, Labor Pros, a business similar to respondent, during the same 26-week period from January to July 2005. Claimant said he worked an average of 20 hours per week at Labor Pros and was paid from $9.25 to $9.50 per hour.

Q. [Respondent's attorney] Did you work at Labor Pro[s] in January [2005] at all?

A. A few days, yes. I worked at the sausage plant.

Q. So you worked a few days in January of '05 at the sausage plant. Do you know how many days?

A. No, sir, I could not be precise. I know at least two weeks.

Q. By that do you mean ten days, five days a week?

A. Yes.

Q. So you think you worked at least ten days for Labor Pro[s] in January of '05 at the sausage plant?

A. Yes, that would have been in the Topeka office.

. . . .

Q. And you were paid by the hour for those ten days in January of '05?

A. Yes.

Q. How much did you receive an hour?

A. There I was getting like $9.25, $9.50. I don't remember exactly.

Q. What were you doing at this sausage plant?

A. Packaging sausage, frozen sausage.

. . . .

Q. Then in February '05 is that when you started to work at this mattress outlet at 95th and Quivira?

A. Yes.

Q. How long did you work there?

A. Like five weeks, six weeks.

Q. How many hours a week for that five to six weeks?

A. It was different. Some weeks were 20 hours, some weeks were 25.

Q. So 20 to 25 hours per week?

A. Yes.

Q. How much did you earn per hour when you were working at the mattress outlet?

A. $9.75 an hour.

Q. Were you working there five days per week?

A. No, I was working there two to three days a week.

Q. Two to three days a week for five to six weeks?

A. Yes.

Q. At $9.75 per hour.

A. Yes.

Q. What were you doing at the mattress outlet?

A. Loading trucks out of a warehouse.

. . . .

Q. How long did you work at the mattress outlet? I think you said you started there in February.

A. Like six weeks.

Q. So that would get us into let's say April sometime. Is that close?

A. That sounds about right.

Q. Then did you continue to work for Labor Pro[s] after that?

A. No.

Q. So that was it?

A. Well, I think I worked like one day or two days in May and then I worked like two weeks in June, but not for the mattress company. It was other different various jobs.

Q. Then the one to two days in May, where did you work?

A. Doing construction cleanup.

Q. That was just one to two days?

A. Yes.

Q. Were you paid by the hour.

A. Yes.

Q. How much were you paid on an hourly basis?

A. Like $7.50 an hour.

. . . .

Q. Then your final work for Labor Pro[s] June of '05 you worked approximately two weeks?

A. Yes.

Q. Would that have been for a continuous two-week period or spread out throughout the month?

A. It would have been continuous.

Q. Where did you work those two weeks?

A. Construction cleanup.

Q. So basically the same thing you were doing for those one to two days in May of '05?

A. Yes, only for a different company.

Q. How much were you paid per hour?

A. $7.50.

Q. So the same wages in May; correct?

A. Yes.

Q. So let's go back and make sure that we got all of this correct as far as your work for Labor Pro[s] in the six months or so before you had your fall. You started to work for Labor Pro[s] out of their Topeka office in January of 2005; right?

A. Yes.

Q. In January you worked for approximately ten days at the sausage plant in Topeka?

A. Correct.

Q. That would have been two 40-hour weeks?

A. Yes.

Q. Did you work any overtime?

A. No.

Q. You were paid an hourly basis for that work?

A. Yes.

Q. And I probably asked you what your hourly rate was, but I didn't jot it down. What was your rate at the sausage plant?

A. It was like either $9.25 or $9.50. I don't remember for sure.

Q. Then your next work for Labor Pro[s] began in February of 2005 and that was for the mattress outlet at 95th and Quivira in Overland Park, Kansas?

A. Correct.

Q. That work for Labor Pro[s] lasted for a period of five to six weeks?

A. Yes.

Q. Q. Started in February, ended sometime in April of '05?

A. Correct.

Q. And you were working during that five to six-week period 20 to 25 hours per week?

A. Yes.

Q. At $9.75 an hour?

A. Yes.

. . . .

Q. Then in May of 2005 you only worked one to two days for Labor Pro[s]?

A. That's correct.

Q. And that involved construction cleanup for $7.50 an hour?

A. Yes.

Q. Then your last work for Labor Pro[s] was for a two-week period in June of 2005 also doing construction cleanup?

A. Yes.

Q. Bur for another location?

A. For a different company.

Q. But at the same hourly rate, $7.50 an hour.

A. Yes.[4]

Claimant's uncontradicted testimony is the only evidence in the record concerning claimant's employment at Labor Pros and the amount he earned while working for that other employer while he was also working part time for respondent. Accordingly, from January through June 2005, through Labor Pros, claimant earned approximately $740 at the sausage plant (10 days x 8 hours per day x $9.25); $1,092 at the mattress outlet (14 days x 8 hours per day x $9.75); and $720 doing construction cleanup (12 days x 8 hours per day x $7.50) for a total of $2,552. This total, divided by 26 weeks, results in an average gross weekly wage of $98.15 from Labor Pros.

[4] Fraga Depo. (Sept. 29, 2006) at 37-46.

On July 19, 2005, while claimant was working at a job at which he was placed through respondent, he fell off a 10-foot ladder. As a result of the fall, claimant broke at least one rib, ruptured his spleen, and injured his left hip, low back, and left elbow. Claimant was seen by a large number of doctors and was released to return to work in November 2005. The majority of claimant's treatment was for his rib fracture, his elbow injury, and his internal injuries. Claimant did not receive any medical treatment for his low back or his hips.

Claimant's hips and legs are no longer causing him any problems. He continues to have pain in his low back, which radiates upwards. He also has breathing problems and pain in his left side, left elbow, ribs, and right shoulder. He complains of headaches. Claimant had his right kidney removed in October 2005 because a malignancy was found during a CAT scan done as a result of his work injury. The malignancy was not caused by the accident, and claimant is not having any problems related to this surgery.

After claimant was released to return to work in November 2005, he worked for a Texas company for three weeks. He also worked for SOS Staffing out of Lubbock, Texas, for six weeks, as well as for respondent out of its Lubbock, Texas, office. Claimant has since returned to Kansas.

Dr. Daniel Zimmerman, a board certified independent medical examiner, examined claimant on December 23, 2005, at the request of claimant's attorney. Claimant's chief complaints were left elbow pain and pain affecting the lumbosacral spine and hips. Although claimant testified he told Dr. Zimmerman about his neck pain and breathing problems, Dr. Zimmerman denied claimant mentioned those problems.

Upon examination, Dr. Zimmerman found that claimant's gait and station were normal. Claimant reported pain in eliciting the left triceps reflex. Perception to pin prick on the right side was normal. On the left side, claimant characterized his sensation to pin prick medially as a 5 and laterally as a 4 from the axilla to the wrist crease level. Ten is a normal sensory perception to pin prick. Perception to pin prick on the right palm revealed numbness affecting the thumb, index and middle fingers. On the left palm, claimant reported numbness affecting the thumb. Dr. Zimmerman found, after assessment of the shoulder, wrist, finger, and thumb, that claimant demonstrated a functional range of motion, muscle strength, bulk, and function.

In regard to claimant's elbows, Dr. Zimmerman found strength in flexion and extension at the right elbow level was 100 percent of normal without pain or discomfort. Strength in flexion and extension at the left elbow was 90 percent of normal with pain affecting the left elbow reported. Claimant had pain in palpation about the left elbow over the medial epicondyle and lateral epicondyle, with severe pain and discomfort in palpation over the radial head. Tinel's test at the left elbow over the cubital tunnel caused pain at the site of tapping. Claimant, however, showed no symptoms of entrapment neuropathy. Claimant's grip using the left side showed less strength than his right.

In examining claimant's lumbosacral spine, Dr. Zimmerman found claimant had intraspinous tenderness from L1 through S1. There was no spasm of the lumbar paraspinous musculature on the right or left sides. There was tenderness in palpation over the left lumbar paraspinous musculature. There was sciatic notch tenderness in palpation on the right and left sides. Dr. Zimmerman used a inclinometer to measure claimant's active range of motion. Claimant had forward flexion of 65 degrees, extension at 15 degrees, flexion to the right of 25 degrees, flexion to the left of 35 degrees, and rotation to the right and left of 30 degrees. Straight leg raising on the right at 60 degrees caused pain affecting the right lumbar paraspinous musculature. Straight leg raising on the left at 70 degrees caused pain affecting the left lumbar paraspinous musculature and the left flank. In the abduction and adduction phases of testing, claimant reported pain affecting the left lumbar paraspinous musculature. Dr. Zimmerman tested claimant's lower extremity strength manually and found that the strength of toes 2 through 5 on the right and left sides was 75 percent of normal. Strength of the flexors and extensors at ankle and knee levels was normal.

Using the range of motion model of the AMA *Guides*, Dr. Zimmerman found that claimant had an 8 percent permanent partial impairment to the body as a whole for degenerative changes affecting the left elbow. He rated claimant as having a 16 percent permanent partial impairment to the body as a whole for permanent aggravation of lumbar disc disease at L5-S1 with range of motion restrictions, pain and discomfort, and lower extremity sensory and motor symptoms. Using the Combined Values Chart, he computed that claimant had 23 percent permanent partial impairment to the body as a whole. Dr. Zimmerman opined that the cause of claimant's permanent partial impairment was his fall on July 19, 2005. Claimant also had internal injuries as a result of the fall, including a fractured rib, lacerated spleen, and right renal contusion. Dr. Zimmerman did not assign any permanent impairment of function for those injuries.

If Dr. Zimmerman had used the DRE model rather than the range of motion model, claimant's disability rating relating to the lumbar spine would have been 10 percent rather than 16 percent. Dr. Zimmerman found that claimant had radicular weakness in each leg, and his rating of claimant's lumbar spine was predicated on the presence of radiculopathy. Dr. Zimmerman acknowledged that this finding had not been confirmed by diagnostic testing.

Dr. Terrence Pratt, who is board certified in physical medicine and rehabilitation, examined claimant at the request of respondent on September 29, 2006. He took a history from claimant and reviewed his past medical records. He did not view any x-ray films, nor did he take any x-rays.

Claimant complained to Dr. Pratt of weakness in his left elbow with dull aching pain laterally without radicular symptoms, discoloration, temperature asymmetry, cervical symptoms, or numbness. Claimant's low back symptoms were more significant and were described as near continuous with mid to low back involvement on the left. The symptoms

did not radiate into the lower extremities. Claimant denied lower extremity weakness, numbness, discoloration, or temperature asymmetry.

Dr. Pratt diagnosed claimant with a history of fall with multiple trauma with resolution of splenic laceration, history of left rib fractures, residual left elbow discomfort with history of contusion and degenerative disease, and history of low back pain with preexisting degenerative disc disease.

In regard to claimant's left elbow, Dr. Pratt noted he had limitations in active movement, primarily in extension where he found claimant lacked 15 degrees of extension. Flexion was not consistent. There was no other significant limitations in range of motion resulting in permanency. Claimant had no evidence of peripheral nerve entrapment, and there was no significant limitations in terms of grip strength. There was some intermittent crepitus at the elbow level. Claimant's medical history showed he had some degenerative changes at the elbow.

On assessment of the lower extremities, Dr. Pratt found no significant palpable tenderness, edema, erythema, or temperature asymmetry with symmetrical peripheral pulses. Claimant had palpable tenderness on the left between the anterior and posterior axillary lines from the mid level extending to the obliques of the abdomen. On assessment of his motor abilities, claimant was able to tolerate full resistance of the major muscle groups of the bilateral upper and lower extremities. Using a Jamar Dyanometer, Dr. Pratt found no significant asymmetry. Reverse straight leg raising at 70 degrees revealed hip discomfort on the left, however the right was negative. Straight leg raising at 30 degrees on the left revealed hip discomfort. On the right at 40 degrees, straight leg raising revealed low back discomfort. Claimant's gait pattern was functional, but he reported difficulties on the left with heel walking.

Dr. Pratt rated claimant's permanent partial impairment of the left elbow to be 7 percent of the upper extremity. He opined that 4 percent of that rating related to claimant's injury and 3 percent related to the degenerative changes which he could not relate totally to the fall. The 4 percent rating to claimant's upper extremity converted to a 2 percent rating to the body as a whole.

Dr. Pratt agreed that a person with degeneration in an elbow but having no symptoms would have a 0 percent rating. Claimant, however, had crepitus that Dr. Pratt attributed to degeneration, not the accident. Dr. Pratt admitted, however, that scar tissue from an injury could result in crepitus.

In regard to claimant's lumbosacral region, Dr. Pratt found he had some preexisting degenerative changes. He considered the range of motion model and believed claimant was between categories 2B and C, which would place him between 5 percent and 7 percent of the whole person. Dr. Pratt found no neurologic deficits. There were some loss of flexion, resulting in an additional 2 percent impairment. Combining these ratings, Dr.

Pratt found that claimant had somewhere between 7 to 9 percent permanent partial impairment to the body as a whole to his lumbosacral region. Of that, Dr. Pratt opined that 5 percent related to the fall.

Combining the 5 percent permanent partial impairment rating for the lower back and the 2 percent permanent partial impairment to the whole body for the left elbow, Dr. Pratt opined that claimant had a 7 percent permanent partial impairment to the body as a whole. Dr. Pratt based his assessment of claimant's impairment on the AMA *Guides*.

PRINCIPLES OF LAW

K.S.A. 44-534(a) states in part:

> Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due.

K.A.R. 51-3-8 states in part:

> The parties shall be prepared at the first hearing to agree on the claimant's average weekly wage except when the weekly wage is to be made an issue in the case. (a) Before the first hearing takes place, the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case. The following stipulations shall be used by the parties in every case:
>
> . . . .
>
> QUESTIONS TO BOTH PARTIES
>
> 10. What was the average weekly wage?
>
> . . . .
>
> 20. Have the parties agreed upon a functional impairment rating?
>
> (b) An informal pre-trial conference shall be held in each contested case before testimony is taken in a case. At these conferences the administrative law judge shall determine from the parties what issues have not been agreed upon. If

the issues cannot be resolved, the stipulations and issues shall be made a part of the record.

(c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

K.S.A. 511 states in part:

(a)(4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

(b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:

. . . .

(5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. If the

employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.

. . . .

(7) The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment.

K.S.A. 44-510d(a) states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss

of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

K.S.A. 44-510e(a) states in part:

> If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In *Bryant*,[5] the Supreme Court held:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e.

---

[5] *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986); see also *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, 548 P.2d 746 (1976); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Bergemann v. North Central Foundry, Inc.*, 215 Kan. 685, 527 P.2d 1044 (1974); *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973); *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972); *Fogle v. Sedgwick County*, 9 Kan. App. 2d 129, 673 P.2d 465 (1983), *aff'd* 235 Kan. 386, 680 P.2d 287 (1984).

If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

In *Casco*,[6] the Kansas Supreme Court stated:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the [*sic*] K.S.A. 44-510d.
>
> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.
>
> K.S.A. 44-510c(a)(2) requires that the disability result from a single injury and that condition may be satisfied by the application of the secondary injury rule.

The Kansas Supreme Court, in *Casco*[7], also stated: "A factfinder cannot disregard undisputed evidence that is not improbable, unreasonable, or untrustworthy. Such evidence must be regarded as conclusive."

---

[6] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, Syl. ¶¶ 7, 8, 9, 10, 11, *reh. denied* (2007).

[7] *Id*, Syl. ¶ 2.

ANALYSIS

Claimant was a part-time hourly employee of respondent with a gross average weekly wage of $93.94. Claimant was also a part-time hourly employee of Labor Pros with a gross average weekly wage of $98.15. Claimant was a temporary worker for both respondent and Labor Pros. He performed a similar type of work for both respondent and Labor Pros. Therefore, his earnings at both employments should be combined. His total average gross weekly wage for these multiple employments is $192.09, and his compensation rate is $128.07.

Casco addressed combinations of scheduled injuries and determined that they could not be treated as general body disabilities. *Casco*, however, did not change the longstanding rule that combinations of scheduled injuries with nonscheduled injuries should be treated together as general body disabilities. In *Bryant*,[8] the Supreme Court held:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Because claimant's injuries are both to a scheduled member and to a nonscheduled member, his permanent partial disability is compensated as a general body disability under K.S.A. 44-510e. Dr. Zimmerman rated claimant's left upper extremity impairment as 8 percent to the body as a whole, which is the equivalent of 14 percent to the upper extremity. He rated claimant's back condition as a 16 percent impairment to the body as a whole. Dr. Pratt rated claimant's left elbow impairment as 7 percent to upper extremity but he only related 4 percent of that 7 percent to the work-related injury. Similarly, Dr. Pratt rated claimant's low back impairment as being 7 to 9 percent to the body as a whole but considered only 5 percent to be related to his injury. The rating opinions given by Dr. Pratt and Dr. Zimmerman are credible. Each is entitled to be given some weight. However, the Board agrees with the ALJ's conclusion that Dr. Zimmerman's rating opinions fit more closely with claimant's injuries and resulting impairments and, therefore, should be given more weight. The Board affirms the ALJ's finding that claimant's permanent partial disability is 18 percent to the body as a whole on a functional basis.

CONCLUSION

Claimant's total gross average weekly wage is $192.09.

Claimant's permanent partial disability is 18 percent to the body as a whole.

---

[8] *Bryant*, 239 Kan. at 689.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 20, 2007, is affirmed in part and modified in part as follows:

Claimant is entitled to 18 weeks of temporary total disability compensation at the rate of $128.07 per week or $2,305.26 followed by 74.16 weeks of permanent partial disability compensation at the rate of $128.07 per week or $9,497.67 for a 18 percent functional disability, making a total award of $11,802.93.

As of June 26, 2007, there would be due and owing to the claimant 18 weeks of temporary total disability compensation at the rate of $128.07 per week in the sum of $2,305.26 plus 74.16 weeks of permanent partial disability compensation at the rate of $128.07 per week in the sum of $9,497.67 for a total due and owing of $11,802.93, which is ordered paid in one lump sum less amounts previously paid.

All reasonable and related medical expenses are ordered paid subject to limitations in the fee schedule.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of June, 2007.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agree with the majority's factual findings and their determination of claimant's average weekly wage, including the conclusion that claimant performed the same type of temporary part-time work for multiple employers and, therefore, his average weekly wage must combine his wages from all his employers. However, we disagree with the majority's conclusion that the claimant's percentage of impairment for his scheduled injury to his arm should be combined with his percentage of impairment for his general body injury to his back for a single permanent partial disability award based upon the total of all his impairments. We read *Casco* to require these injuries to be compensated as separate injuries.

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
>
> . . . .
>
> K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[9]

Applying the "secondary injury rule," the Supreme Court found claimant sustained simultaneous injuries to his bilateral upper extremities (shoulders). Nevertheless, instead of combining the permanent impairment of function percentages for these two shoulder injuries into a single percentage of functional impairment to the body as a whole, the court concluded that "the claimant's award must be calculated as a permanent partial disability in accordance with the [*sic*] K.S.A. 44-510d."[10]

In *Casco*, when discussing *Honn*[11] and its parallel injury rule as it relates to the statutes defining permanent total disability, permanent partial disability, scheduled injuries and general body disabilities, the Supreme Court makes an analogy to baseball.

> The Workers Compensation Act calculates compensation for injured workers in a specific and sequential manner, their order defined by statute as precisely as the four bases on a major league baseball diamond. *Honn* essentially allows the claimant, after successfully reaching first base, to be waived [*sic*] home and

---

[9] *Id.*, Syl. ¶¶ 7, 10.

[10] *Id.*, Syl. ¶ 9.

[11] *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

> exempted from traversing to second and third bases, thus improperly converting a single into a home run.[12]

The majority, by combining the arm injury with the back injury and awarding a general body disability, is skipping over K.S.A. 44-510d and, in effect, converting a single into a home run.

Because the arm is contained within the schedule of K.S.A. 44-510d(a), claimant's disability to that extremity must be compensated according to the schedule at the 210 week level. The back, however, is not contained within the schedule and, therefore, must be compensated as a general body disability under K.S.A. 44-510e.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Richard Billings, Attorney for Claimant
John C. Kennyhertz, Attorney for Self-insured Respondent
Robert H. Foerschler, Administrative Law Judge

[12] *Casco* at 527.